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Forty-first session

Summary record of the 875th meeting
Held at Headquarters, New York, on Monday, 23 June 2008, at 10 a.m.

Chairperson: Mr. Illescas ..... (Spain)

Contents

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*)

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08-39355 (E)

The meeting was called to order at 10.15 a.m.

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658/Add.1-13)

Draft article 63 (Loss of the benefit of limitation of liability)

1. *Draft article 63 was approved in substance and referred to the drafting group.*

Draft article 64 (Period of time for suit)

2. *Draft article 64 was approved in substance and referred to the drafting group.*

Draft article 65 (Extension of time for suit)

3. **Mr.** Ibrahima Khalil **Diallo** (Senegal), supported by **Mr. Imorou** (Benin), **Mr. Nama** (Cameroon), **Ms. Traoré** (Observer for Burkina Faso) and **Mr. Ousseimi** (Observer for the Niger), drawing attention to the written comments on draft article 65 (A/CN.9/658/Add.1, paras. 16-18), submitted by a number of African States to express their concerns regarding the potential effects of the draft article in certain African jurisdictions, said that in order to ensure that the text was acceptable to the industry and, in particular, insurance companies, the first clause of draft article 65 reading "The period provided in article 64 shall not be subject to suspension or interruption, but" should be deleted. Draft article 65 would then read: "The person against which a claim is made may at any time during the running of the period extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations". Thus, while the initial two-year period for suit would remain unchanged, suspension or interruption of that period would not be formally prohibited. The draft article would then be in line with other relevant international instruments, such as the Warsaw Convention.

4. **Mr. Elsayed** (Egypt) said that, since the second part of draft article 65 contradicted the first part, the second part should be deleted. Left in its current form, the draft article might have adverse effects, since the potentially indefinite extension it provided for meant that the other party could be taken by surprise at any time and could not plan its legal action properly.

5. **Mr. Morán Bovio** (Spain) said that he favoured retaining draft article 65 in its current form because it managed to preserve the delicate balance between, on the one hand, the need for legal certainty and uniformity (by setting a two-year period for suit), and, on the other hand, the need for a degree of flexibility (by allowing for the extension of that period).

6. **Mr. Miller** (United States of America) endorsed the remarks made by the representative of Spain. If the proposal to delete the first part of the first sentence of draft article 65 was adopted, the question of suspension or interruption of the two-year period provided for in draft article 64 would be governed solely by domestic law, which varied significantly from country to country. That had been the case under the Hague-Visby Rules and had led to a lack of uniformity and predictability, particularly for shippers, and encouraged forum-shopping. His delegation had originally been in favour of a one-year period of time for suit. The decision to increase the period to two years provided much of the additional protection sought by the representative of Senegal.

7. **Mr. Mollmann** (Observer for Denmark) said that he supported the statements of the representatives of Spain and the United States. Although draft article 65, if approved, would require amendments to most States' ordinary rules on limitation of actions, including those of his own country, it would create a uniform regime at the international level. The prohibition of suspension and interruption was counter-balanced by the increase of the period of time for suit to two years from the one-year period under the Hague-Visby Rules, to which most maritime carriage was subject. His delegation had originally advocated a one-year period and thought that two years was ample time for a shipper to bring suit.

8. **Mr. Sharma** (India) recalled that the Working Group had engaged in lengthy discussions on draft article 65. In the interest of legal uniformity, he favoured retaining the text as currently drafted.

9. **Mr. Sato** (Japan) said that he sympathized with the position of the African countries. Nevertheless, since the relevant legal regime differed from country to country, it was important to take a standardized approach to the issue of time limits. As for the concerns regarding extension by declaration expressed by the representative of Egypt, he recalled that that practice was not new, having already been sanctioned by the Hague-Visby and Hamburg Rules.

10. **Mr. Sandoval** (Chile) said that it was perfectly possible to reconcile the two imperatives of legal certainty and flexibility by allowing for agreement on an extension of time for suit. His delegation would prefer to retain the current version of draft article 65.

11. **Mr. Berlingieri** (Italy) said that his delegation was in favour of retaining the current version of draft article 65. Deleting the first part of the draft article would mean that the issue of suspension or interruption of the period of time for suit would be governed solely by domestic law, a situation that would undermine the Commission's aim of achieving uniformity.

12. **Mr. Prosser** (United Kingdom), **Mr. Kim** In Hyeon (Republic of Korea), **Mr. Schelin** (Observer for Sweden) and **Ms. Talbot** (Observer for New Zealand), endorsed the remarks made by the representatives of Spain and the United States.

13. **Mr. Elsayed** (Egypt) clarified that he was not in favour of deleting the first phrase of draft article 65. However, like some other States, Egypt took the view that a time limit for requests for extension should be established.

14. **Mr. Essigone** (Gabon) said that the two-year period for suit was in line with international maritime practice. However, in its current form, draft article 65 did not grant the claimant sufficient flexibility, and for that reason his delegation supported the proposal put forward by the representative of Senegal.

15. **Mr. Moulopo** (Observer for the Congo) said that, in order to strike a better balance between the interests of the carrier and those of the claimant and to prevent any adverse effects on insurance companies, his delegation strongly supported the proposal put forward by the representative of Senegal.

16. **Mr. Mayer** (Switzerland) said that he supported retaining the current version of draft article 65 for two reasons. First, it was vital to specify a time limit for suit so that claimants did not have to revert to the relevant provisions of their national law, which differed from jurisdiction to jurisdiction and were often very complicated. Secondly, clarity and predictability were essential to ensure that lawyers for both the plaintiff and the defendant in any given case did not waste time, and thus money, unnecessarily.

17. **Mr. Hu** Zhengliang (China) said that Chinese law permitted suspension and interruption, but not extension; however, his delegation supported the text as drafted in the interests of uniformity.

18. **Mr. Honka** (Observer for Finland) said that insurers in his country found that the two-year time limit allowed enough time for settlement; he therefore supported the current text.

19. **Mr. Gombrii** (Norway) said that his delegation supported retention of the current text because the establishment of clear rules would provide invaluable clarity and legal certainty for both parties.

20. *Draft article 65 was approved in substance and referred to the drafting group.*

Draft article 66 (Action for indemnity)

21. **Ms. Shall-Homa** (Nigeria) questioned why a party being held liable should be allowed to file a counter-claim after the expiration of the period of time for suit.

22. *Draft article 66 was approved in substance and referred to the drafting group.*

Draft article 67 (Actions against the person identified as the carrier)

23. **Mr. Imorou** (Benin) proposed the deletion of the term "bareboat charterer" from the first line of draft article 67 in keeping with draft article 6, which excluded charter parties from the scope of the convention.

24. **Mr. Moulopo** (Observer for the Congo) said that since the draft convention applied only to regular liner transport, he supported the proposal by the representative of Benin.

25. **Mr. Mayer** (Switzerland) said that draft article 67 should be retained purely in the interests of shippers and claimants. It allowed a generous amount of time for the shipper to sue another party in cases where the carrier was not identified, a situation addressed in draft article 39.

26. **Mr. Imorou** (Benin) said that, as he understood it, draft article 39 addressed the problem of identifying the carrier, whereas draft article 67 assumed that the carrier had been identified.

27. **Mr. Mbiah** (Observer for Ghana) said that it was true that draft article 39 and draft article 67 were protective of shippers because they provided the

opportunity to locate the actual carrier by bringing a claim against the registered owner or the bareboat charterer; therefore, the text of draft article 67 should remain as it was.

28. *Draft article 67 was approved in substance and referred to the drafting group.*

29. **The Chairperson** said that, when considering the separate draft articles of chapter 14 (Jurisdiction), the Commission should bear in mind that draft article 76 contained an "opt-in" clause establishing that only States that made a positive declaration would be bound by the provisions of the chapter.

30. **Ms. Downing** (Australia) said that since chapter 14 contained no provision like that in draft article 77, paragraph 5, stating that any agreement contrary to that article was void, her delegation understood draft article 76 to mean that States that chose not to opt in reserved the right to regulate matters of jurisdiction according to national law. It was a fundamental issue for her delegation that Australian cargo claimants should be able to bring claims in Australia.

31. **Mr. Oyarzábal** (Observer for Argentina) said that his delegation would have preferred not to have allowed for exclusive choice of court agreements, which had been excluded in a number of MERCOSUR multimodal transport agreements. In his national jurisdiction the determination of jurisdiction or subjection to arbitration could always be made ex post facto, in other words, after the events that had given rise to the dispute.

32. **Mr. Sato** (Japan) said that, as he understood it, draft article 76 gave a free hand to the contracting State to regulate the question of jurisdiction and had his delegation's full support.

33. **Mr. Miller** (United States of America) said that his delegation supported chapter 14 as a whole; it represented a carefully balanced agreement in the Working Group. He agreed with the interpretation that States that did not opt in would retain the power under domestic law to give more or less protection to claimants. The chapters on arbitration and jurisdiction were similar in many respects, but the arbitration chapter had been drafted to harmonize with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Draft article 68 (Actions against the carrier) and definitions of "domicile" and "competent court"

34. **The Chairperson** noted that the definitions of "domicile" and "competent court" contained in draft article 1, paragraphs 28 and 29 were related to draft article 68.

35. *Draft article 68 and draft article 1, paragraphs 28 and 29, were approved in substance and referred to the drafting group.*

Draft article 69 (Choice of court agreements)

36. **Ms. Downing** (Australia), referring to her Government's written comments (A/CN.9/658, para. 63), said that in paragraph 2 (c) the meaning of "timely and adequate notice" was unclear and was likely to lead to much litigation. Her Government did not support the principle of binding a consignee or any third party unless it consented to be bound.

37. **Mr. Elsayed** (Egypt) said that he shared the concerns expressed by the representative of Australia about binding a person by an exclusive choice of court agreement when that person had not been a party to the agreement.

38. **Ms. Carlson** (United States of America) said that she agreed with the representative of Australia that any country that did not opt into chapter 14 was allowed to regulate matters of jurisdiction according to domestic law. Draft article 69 and chapter 14 as a whole were part of a carefully crafted compromise. In agreeing to the wording of paragraph 2 (c), the Working Group had decided that what constituted timely and adequate notice should be determined by domestic law. Her delegation supported the retention of the current wording of draft article 69.

39. *Draft article 69 was approved in substance and referred to the drafting group.*

Draft article 70 (Actions against the maritime performing party) and draft article 71 (No additional bases of jurisdiction)

40. *Draft articles 70 and 71 were approved in substance and referred to the drafting group.*

Draft article 72 (Arrest and provisional or protective measures)

41. **Mr. Lebedev** (Russian Federation) said that the broad wording of draft article 72, subparagraph (a), which set out the condition that the requirements of chapter 14 must be fulfilled, left room for interpretation. He took it to mean that a court that had taken provisional or protective measures was competent to consider the merits of a case if it had jurisdiction under any of the provisions of chapter 14. He would be interested to hear whether others had a different interpretation of paragraph (a).

42. **Ms. Carlson** (United States of America) and **Mr. Elsayed** (Egypt) agreed with that interpretation.

43. *Draft article 72 was approved in substance and referred to the drafting group.*

The meeting was suspended at 11.45 a.m. and resumed at 12.15 p.m.

Draft article 73 (Consolidation and removal of actions) and draft article 74 (Agreement after dispute has arisen and jurisdiction when the defendant has entered an appearance)

44. *Draft articles 73 and 74 were approved in substance and referred to the drafting group.*

Draft article 75 (Recognition and enforcement)

45. **Mr. Miller** (United States of America) pointed out that the Working Group had overlooked one of the consequential changes that had become necessary after it had decided against a partial opt-in approach to the chapter on jurisdiction. He proposed that in paragraph 2 subparagraph (b) should be deleted and the chapeau and subparagraph (a) should be combined.

46. **Mr. Sharma** (India), **Mr. Sato** (Japan) and **Mr. Berlingieri** (Italy) endorsed the technical correction proposed by the representative of the United States.

47. *Draft article 75, as amended, was approved in substance and referred to the drafting group.*

Draft article 76 (Application of chapter 14)

48. **The Chairperson** took it that the Commission accepted the opt-in clause, as set out in draft article 76.

49. *Draft article 76 was approved in substance and referred to the drafting group.*

50. **The Chairperson** reminded the Commission that draft article 80 contained an opt-in clause that applied to the whole of chapter 15 on arbitration.

Draft article 77 (Arbitration agreements)

51. **Mr. Kim** In Hyeon (Republic of Korea) pointed out that "the person asserting a claim against the carrier" in draft article 77 was referred to elsewhere in the draft convention sometimes as the "claimant" (draft articles 18 and 50) and sometimes as the "plaintiff" (draft articles 68 and 70). The wording should be made consistent.

52. **Mr. Miller** (United States of America), supported by **Mr. Sato** (Japan) said that the drafting group could address the issue of consistency. He would just like to point out that the word "plaintiff" should not be used to denote "the person asserting the claim against the carrier" in chapters 14 and 15, as reference was specifically being made there to the cargo claimant, and "plaintiff" could be taken to mean any person bringing a claim, including the carrier.

53. **Ms. Czerwenka** (Germany) said that her delegation was satisfied with the draft article as currently worded.

54. *Draft article 77 was approved in substance and referred to the drafting group.*

Draft article 78 (Arbitration agreement in non-liner transportation)

55. *Draft article 78 was approved in substance and referred to the drafting group.*

Draft article 79 (Application of chapter 15)

56. **Ms. Marcovčić Kostelac** (Observer for Croatia) wondered what would happen in the event that Contracting Party opted to be bound by the provisions of chapter 15 but not of chapter 14, since the draft article bracketed the two chapters together.

57. **Mr. Miller** (United States of America) said that in some jurisdictions the provisions in chapter 14 could be interpreted as precluding all dispute resolution clauses. The aim of chapter 15 was to interfere with the arbitration system as little as possible and ensure that, if a State had opted in to the jurisdiction chapter,

parties could not evade that application of that chapter through arbitration. In the unlikely event that a State opted in to chapter 15 but not to chapter 14, the reference to chapter 14 would be meaningless and do no harm.

58. *Draft article 79 was approved in substance and referred to the drafting group.*

Draft article 80 (Application of chapter 15)

59. *Draft article 80 was approved in substance and referred to the drafting group.*

Draft article 81 (General Provisions)

60. **Ms. Czerwenka** (Germany) said that the text of her delegation's proposed amendment to draft article 81 would be circulated soon.

61. **The Chairperson** said he took it that the Commission wished to defer consideration of draft article 81 until it had the proposed amendment before it.

62. *It was so decided.*

Draft article 83 (Special rules for live animals and certain other goods)

63. **Mr. Sato** (Japan) recalled an amendment proposed by Japan in its written comments (A/CN.9/658/Add.6, para. 6) to ensure consistency between the wording of the draft article and that of draft article 63. He proposed the insertion after the words "referred to in article 19" in subparagraph (a) of the following words: "done with the intent to cause such loss or damage to the goods or the loss due to delay or".

64. **Mr. Berlingieri** (Italy), **Mr. Miller** (United States of America), **Mr. van der Ziel** (Observer for the Netherlands), **Mr. Morán Bovio** (Spain), **Mr. Kim** In Hyeon (Republic of Korea), **Mr. Sharma** (India) and **Mr. Madariaga** (Honduras) supported the proposal by Japan.

65. *Draft article 83, as amended, was approved in substance and referred to the drafting group.*

The meeting rose at 1 p.m.